Sochima Okoye v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO R-05-1-94
SHAIK DAUD, GOPAL SRI RAM AND VC GEORGE JJCA
17 FEBRUARY 1995

Criminal Law *— Dangerous Drugs Act (Malaysia) — Section 39B(1)(a) — Trafficking in dangerous drugs — Statutory presumptions — Drugs recovered from accused's bags — Defence of innocent carrier — Whether judge must consider whether another person is real trafficker — Whether presumption of trafficking becomes irrebuttable once presumption of possession is not rebutted — Whether judge must consider rebuttal of each presumption separately — Dangerous Drugs Act 1952 s 37(d) & (da)*

Evidence *— Presumption — Trafficking in dangerous drugs — Presumptions raised as to possession and trafficking — Whether judge must consider rebuttal of each presumption separately — Dangerous Drugs Act 1952 s 37(d) & (da)*

Evidence *— Burden of proof — Accused's burden — Rebutting statutory presumption — Standard of proof to rebut presumption — Dangerous Drugs Act 1952 s 37(d) & (da)*

This was an appeal by the appellant who had earlier been convicted for an offence under s 39B of the Dangerous Drugs Act 1952 ('the Act'). The appellant was found to have in his custody 2,840.3g of heroin at the customs office at Padang Besar. The appellant in his defence said that he had befriended one Smith who had handed him two bags in Bangkok containing kitchen utensils to be carried to Singapore. The trial judge, while accepting that the defence's story about Smith was not inherently incredible, found on the totality of the evidence that the defence 'had failed to rebut the statutory presumptions' under s 37(d) and (da) of the Act on the balance of probabilities, and held that the appellant was guilty and duly convicted him. Counsel for the appellant submitted that after the trial judge had made a finding the appellant had failed to rebut the presumption under s 37(d), he was under a further duty to consider, as a separate and distinct exercise, whether the presumption under s 37(da) of the Act had been rebutted. Counsel also contended that the judge should have considered whether Smith ever existed, as in law a person in possession of a dangerous drug would be entitled to an acquittal on a charge of trafficking by demonstrating either on a balance of probabilities or by raising a reasonable doubt that there is another who is the real trafficker.

Held, allowing the appeal:

(1) In a criminal case, the prosecution bears a general burden of proof to prove beyond reasonable doubt the guilt of the accused. The prosecution may rely on available statutory presumptions to prove the essential ingredients of the charge. When that occurs,

A the particular burden of proof shifts to the defence to rebut such presumptions on the balance of probabilities.

(2) In the present case, merely because the defence had failed to rebut the presumption of possession under s 37(d) of the Act did not mean that the presumption of trafficking under s 37(da) of the Act would become irrebuttable. Unless the evidence in a particular case did not so warrant, the court must consider whether on a balance of probabilities the defence had rebutted the statutory presumption of trafficking under s 37(da) as a separate exercise even though it was satisfied on balance that the presumption under s 37(d) had not been rebutted.

(3) Reading the judgment of the trial judge as a whole, it was clear that no such separate exercise had been carried out. The use of the expression 'presumptions' by the trial judge did not amount to sufficient compliance with the aforesaid requirement.

(4) The judge, having found the appellant's story about the existence of Smith to be true, ought to have addressed his mind to the further question as to whether there was any reasonable doubt raised that Smith was the real trafficker, but did not do so.

(5) The failure of the judge to properly direct himself rendered his ultimate conclusion fatally flawed. A miscarriage of justice might well have occurred and the court had no alternative but to set aside the death sentence and enter a conviction for possession under s 39A(2) of the Act. The appellant was sentenced to life imprisonment and 12 strokes of the rotan.

[Bahasa Malaysia summary

Ini adalah satu rayuan oleh perayu yang telah disabitkan atas kesalahan di bawah s 39B Akta Dadah Berbahaya 1952 ('Akta itu'). Perayu telah didapati mempunyai dalam jagaannya 2,840.3g heroin di pejabat kastam di Padang Besar. Dalam pembelaannya perayu mengatakan bahawa beliau telah berkawan dengan seorang bernama Smith yang telah menyerahkan kepadanya dua buah beg di Bangkok yang mengandungi peralatan dapur untuk dibawa ke Singapura. Hakim perbicaraan, sedangkan beliau berpendapat yang cerita pihak pembela tentang Smith itu bukan sememangnya tidak boleh dipercayai, mendapati atas keseluruhan keterangan bahawa pihak pembela 'telah gagal mematahkan anggapan-anggapan statutori' di bawah s 37(d) and (da) Akta itu atas imbangan kebarangkalian, dan memutuskan bahawa perayu bersalah, lantas menyabitkannya. Peguambela perayu berhujah bahawa selepas hakim perbicaraan telah membuat keputusan bahawa perayu gagal mematahkan anggapan di bawah s 37(d), beliau mempunyai satu tugas lanjut untuk mempertimbangkan sebagai satu gerak kerja yang berasingan dan tersendiri, sama ada anggapan di bawah s 37(da) Akta itu telah dipatahkan. Peguambela juga berhujah bahawa hakim sepatutnya memperimbangkan sama ada Smith pernah wujud kerana di sisi undang-undang, seseorang yang memiliki dadah

berbahaya akan berhak dibebaskan atas tuduhan mengedar dadah dengan menunjukkan sama ada atas imbangan kebarangkalian atau dengan menimbulkan keraguan munasabah bahawa terdapat seorang lain yang merupakan pengedar yang sebenar. A

Diputuskan, membenarkan rayuan itu: B

(1) Di dalam satu kes jenayah, pihak pendakwa memikul beban pembuktian secara amnya untuk membuktikan kesalahan tertuduh sehingga melampaui keraguan munasabah. Pihak pendakwa boleh bergantung pada anggapan statutori untuk membuktikan unsur-unsur dakwaan itu. Apabila itu berlaku, beban pembuktian atas isu tertentu itu beralih kepada pihak pembela untuk mematahkan C anggapan itu atas imbangan kebarangkalian.

(2) Di dalam kes ini, cuma kerana pihak pembela telah gagal mematahkan anggapan pemilikan di bawah s 37(d) Akta itu tidak bermakna bahawa anggapan pengedaran di bawah s 37(da) Akta itu akan menjadi tidak boleh dipatahkan. Melainkan jika D keterangan di dalam sesuatu kes tidak menjadikannya perlu, adalah menjadi tugas mahkamah untuk mempertimbangkan sama ada atas imbangan kebarangkalian pihak pembela telah mematahkan anggapan statutori pengedaran di bawah s 37(da) sebagai satu gerak kerja berasingan walaupun mahkamah berpuas hati atas imbangan bahawa anggapan di bawah s 37(d) tidak E dipatahkan.

(3) Dengan membaca penghakiman hakim perbicaraan secara keseluruhan, adalah jelas bahawa gerak kerja berasingan sedemikian tidak dijalankan. Penggunaan ungkapan 'anggapan-anggapan' oleh hakim perbicaraan tidaklah mencukupi untuk F mematuhi keperluan yang tersebut di atas dengan secukupnya.

(4) Hakim itu, selepas mendapati bahawa cerita perayu tentang kewujudan Smith itu adalah benar, sepatutnya mempertimbangkan soalan lanjut sama ada terdapat apa-apa keraguan munasabah yang timbul bahawa Smith merupakan G pengedar yang sebenar, tetapi tidak berbuat demikian.

(5) Kegagalan hakim untuk mengarahkan dirinya dengan betul menjadikan keputusan muktamadnya salah dengan padah sekali. Satu ketidakadilan mungkin telah berlaku dan mahkamah tidak ada pilihan melainkan untuk mengetepikan hukuman gantung H yang telah dijatuhkan dan mencatatkan satu sabitan untuk milikan di bawah s 39A(2) Akta itu. Perayu telah dihukum penjara seumur hidup dan 12 sebatan rotan.]

Notes

For cases on trafficking in dangerous drugs, see 4 *Mallal's Digest* (4th Ed) paras 54–108; [1989] Mallal's Digest 592–624; [1990] Mallal's Digest 465–467; [1991] Mallal's Digest 820–849; [1992] Mallal's Digest 656–671; [1993] Mallal's Digest 526–538. I

A For cases on the accused's burden of proof, see 7 *Mallal's Digest* (4th Ed) paras 97–126.

Cases referred to

Gooi Loo Seng v PP [1993] 2 MLJ 137 (folld)
B *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169 (folld)
Rameshwar v State of Rajasthan AIR 1952 SC 54 (refd)
Tan Yook Suan v R [1954] MLJ 116 (refd)

Legislation referred to

C Dangerous Drugs Act 1952 ss 37(d), (da), 39A(2), 39B, First Schedule

Appeal from: Criminal Trial No 47–42–91 (High Court, Kangar)

Karpal Singh (*Manjit Singh* and *T Gunaseelan*) (*Manjit Singh & Co*) for
D the appellant.
SC Augustin (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

E **Gopal Sri Ram JCA** (delivering the judgment of the court): This appeal was heard on 7 February 1995. At the conclusion of argument we allowed the appeal, quashed the conviction under s 39B of the Dangerous Drugs Act 1952 ('the Act') and set aside the sentence of death passed by the High Court. In its stead, we entered a conviction under s 39A(2) of the Act and, after considering the plea in mitigation advanced by Encik Karpal Singh of
F counsel for the appellant, imposed a sentence of life imprisonment and 12 strokes of the rottan. We also ordered that the sentence of imprisonment do run from the date of the appellant's arrest. The reasons for our decision are now handed down.

The appellant was charged, as has been said, for an offence under
G s 39B of the Act. That charge reads as follows:

> Bahawa kamu, Sochima Okoye, pasport Nigeria No A390813 pada 30 November 1990 kira-kira pukul 11.30 pagi di pejabat Kastam dan Eksais Diraja Malaysia, Bahagian Hasil, Stesyen Keretapi, Padang Besar di dalam Daerah Titi Tinggi dalam Negeri Perlis Indera Kayangan, telah mengedar
H dadah berbahaya iaitu 2840.3g heroin bagi pihak diri kamu sendiri dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 (Semakan 1980) dan boleh dihukum di bawah s 39B(2) Akta yang sama.

The facts of the case as produced by the prosecution in the court below are as follows. On 30 November 1990, PW2 and PW4, both officers of His
I Majesty's Customs, boarded the southbound train at Padang Besar. They were accompanied by three other customs officers. Their task was to conduct a routine search for dutiable goods that may be carried on board by the passengers. In one of the compartments, PW2 and PW4 noticed

three bags on a rack provided for that purpose. These were located above seat No 37 which was vacant at the time. There were the only luggage on that rack. PW3 and PW4 inquired about the ownership of the bags. As a result of information they obtained, PW4 called out to the appellant, who was standing in the queue at the Immigration counter, to come into the compartment in question. The appellant did so. PW4 asked the appellant a number of questions. In response, the appellant answered that he was a Nigerian national travelling from Bangkok to Singapore. PW4 then asked of the appellant: 'Where are your bags?' The appellant responded by pointing to the three bags atop the luggage rack above seat No 37. PW4 requested the appellant to bring down the bags and to open each of them. In one of the bags was a cardboard box marked 'rice cooker'. It is an item that attracts duty. So, PW2 instructed PW4 to have the three bags removed to the customs office at the station for the purpose of ascertaining if there were any other dutiable goods carried by the appellant. The appellant was asked to accompany PW4. This is what is commonly known as a '100% check'. It was, as has been earlier said, a purely routine matter. PW2 also instructed PW4 to collect from the appellant the security deposit that His Majesty's Customs normally collects from transit passengers to ensure that dutiable goods are re-exported from Malaysia.

The appellant carried the three bags to the customs office and placed them on a counter. In the presence of PW2 and PW4, the appellant opened one of the bags. In it was a rice cooker (exh P4). PW3, another customs officer who was also present at the office, examined exh P5. He tried depressing the 'on/off' button but it appeared to be jammed. So he produced a metallic wire and probed the area where the switch was located. When he withdrew the wire he found traces of a whitish powder on it. He was about to undertake a closer examination of the rice cooker when the appellant took flight. A careful search lasting several hours found him hiding in the belukar. He was then taken into formal custody and charged with the extremely serious offence of trafficking in an illicit drug.

Meanwhile, PW5, an officer from the prevention branch who had been sent for by PW3, conducted a careful examination of the appellant's luggage. He found two other rice cookers (exhs P10 and P15). Concealed in each of them were several plastic packets containing what he justifiably believed to be a dangerous drug. PW1, a chemist attached to the chemistry department at Pulau Pinang to whom the substance recovered was sent, positively ascertained that it was heroin as listed in the First Schedule of the Act. The total quantity recovered amounted to 2840.3g.

The appellant's trial before Mohd Saari Yusoff J was held on 17 October 1992. In the course of its case, the prosecution unsuccessfully attempted to adduce four inculpatory statements made by the appellant, the judge, rightly holding that this evidence was inadmissible. At the conclusion of the prosecution's case on 14 January 1993, the learned judge acquitted and discharged the appellant without calling upon him to enter his defence to the charge. The public prosecutor then appealed to the Supreme Court which, on 15 November 1993, not surprisingly allowed

A the appeal and remitted the case back to the learned judge with a direction that the appellant do enter upon his defence. We say 'not surprisingly' because in his written reasons for acquitting the appellant, the learned judge overlooked evidence showing that the appellant was in possession of the proscribed drug. We refer, of course, to the uncontradicted evidence of PW2 and PW4 that the appellant indicated his ownership of the bag B containing the heroin by pointing to it while aboard the train.

The trial of the appellant resumed on 25 February 1994. The appellant elected to give evidence on oath. The gist of his story was that he was befriended in Lagos by an American named James Smith to whom he expressed a desire to emigrate to the United States. Smith is supposed to C have told the appellant that a visit to a third country was necessary before one could apply for entry into the United States. Smith then purchased an airline ticket for the appellant to travel to Singapore. The appellant, when he checked in at Lagos airport, was issued and was in possession of a boarding pass for Singapore. Unfortunately, this aspect of the case was not D pursued by the learned deputy who conducted the prosecution in the court below (not Encik Stanley Augustine who responded to the appeal before us) during the cross-examination of the appellant. One is left to wonder why the appellant, who, while being in possession of a valid ticket with Singapore marked as the destination, undertook the rather longer and more arduous train journey. It is also a matter that attracted the learned E judge's attention as it finds mention in his grounds of judgment. But the learned judge, in the absence of cross-examination upon the subject, was obviously at a disadvantage and quite properly said no more about it.

Returning to the facts, it is common ground that the appellant broke his journey at Bangkok. According to him, the suggestion of a stopover at F Bangkok came from Smith while they were in the air en route to Bangkok. The appellant testified that in Bangkok, Smith handed him two bags containing kitchen utensils to be carried to Singapore. The suggestion that the appellant travel to Singapore by train, the appellant said, came from Smith. The rest of his evidence concerned his journey to Padang Besar and the events there. With regard to his fleeing from the customs office at the G railway station, this is the explanation he gave:

> When I heard them [meaning PW2 and PW4] saying 'heroin or morphine', I was so surprised and shocked as to how the substance came to be in the rice cooker. It crossed my mind then maybe James concealed the substance there. That may be the reason why James wanted me to travel ahead of him H to Singapore. I felt so angry and cheated. I moved two or three steps away from the officials. I mumbled angrily to myself in Nigerian language saying, 'What have I done to this man that he wants to put me in this trouble'. I was very angry with James. When I looked round the whole office, I noticed that I was the only civilian in the office. Then, I became afraid of the whole situation because all the officials were staring at me. My fear doubled when I I recalled about the death penalty written on the disembarkation card which I read shortly before reaching Padang Besar. I was so afraid because I thought the officials were going to kill me instantly. I jumped over the counter and fled.

The learned judge, after hearing the appellant's evidence and the submissions made by counsel and the learned deputy, convicted the appellant on the charge and imposed the mandatory sentence of death by hanging.

Now, reading the record and without the benefit of oral testimony, we found the appellant's story about James Smith to be quite incredible. That such a man as James Smith ever existed, to our mind seemed more consistent with fiction than fact. Nevertheless, sitting as a Court of Appeal, we are, save in very exceptional cases (and we hasten to add that this is not one such case) bound by the facts as found by a trial judge. This is especially so where the finding of fact rests upon a substratum of oral evidence, the credibility of which is entirely for the judge to decide. Had one of us been the trial judge, we may well have equated belief in the existence of James Smith with that of Peter Pan. But that is irrelevant. What is relevant is what the trial judge in this case found. And this is what he said:

> The issue then is whether T (accused) had knowledge of the impugned drugs inside the rice cookers.
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> In his testimony, T stated that he worked as a mill supervisor with a monthly salary of about US$20. About three months prior to the alleged offence, T came to know one American businessman named James Smith who promised to help T in getting a visa to United States.
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> *Up to this point, there was nothing inherently incredible about the defence's story.* (Emphasis added.)

In our view, the learned judge began by asking himself the right question, namely, as to the state of mind of the appellant at the material time. If the appellant knew not that there were concealed in the rice cookers drugs proscribed by the Act, then, although he may have been in possession of them, he may not, according to the law as we understand it, be a trafficker of them. This is in fact the burden of Encik Karpal Singh's argument to which we shall turn shortly. In the determination of the issue relating to the appellant's state of mind, the additional question requiring an answer is whether James Smith ever existed. The sentence in the judgment of the learned judge to which we have supplied emphasis reveals the approach taken by the judge upon that question. We are bound by the finding made by him that there is nothing incredible about so much of the appellant's evidence as relates to the existence of James Smith and about the way in which he befriended the appellant.

Encik Karpal Singh submits that once that finding was made, the learned judge was under the further duty to consider, as a separate and distinct exercise as to whether the presumption under s 37(da) (quite apart from the presumption created by s 37(d)) of the Act had been rebutted. That subsection, in so far as is relevant to this case, reads as follows:

> In all proceedings under this Act or any regulation made thereunder —
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> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the

A

> contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;
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> (da) any person who is found in possession of —
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> (i) 15 grammes or more in weight of heroin;
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> ...
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> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug; ...

The essence of counsel's argument is, as we earlier observed, that in law while one person may be in possession of a dangerous drug, he would be entitled to an acquittal on a charge of trafficking by demonstrating either on a balance of probabilities or by raising a reasonable doubt that there is another who is the real trafficker. In support of his submission, Encik Karpal Singh cited the decision of the Supreme Court in *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169.

In *Radhi*, the facts were these. Four police officers, while on a crime prevention patrol, encountered the accused Radhi and one Hashim. Slung across the shoulders of the accused was a bag. When confronted by the officers, Hashim fled and, despite a diligent search, was never found. Radhi threw the bag he carried into a padi field and fled as well, but was apprehended. The bag when recovered was found to contain more than 500g of cannabis. The accused was charged and convicted for trafficking. He appealed.

The Supreme Court held that in the state of the evidence, the trial judge in that case was correct in finding that a prima facie case had been made out and therefore in calling for the defence. The following is a summary of the evidence led by the accused which we have extracted from the judgment of the Supreme Court delivered by Mohd Azmi SCJ, now FCJ [at pp 170–171]:

> The appellant gave evidence on oath and called eight other witnesses to prove, firstly, that Hashim was the owner of the bag containing the cannabis and that he was merely an innocent and momentary carrier of the bag, and secondly, it was Hashim and not he who was trafficking in the cannabis. The appellant's father (DW4) and mother (DW5), gave evidence to corroborate his story that Hashim was in their house that night watching TV until 11pm when he and the appellant left the house to buy cigarettes. On arrival near the shop, the appellant went to purchase cigarettes whilst Hashim approached a group of three persons — DW6, DW7 and DW8 who were then sitting under a tree. When the appellant came out of the shop, he approached the three persons, one of whom was his own brother (DW7) and was informed that Hashim had gone away for a while on a motor cycle borrowed from one of them. So the appellant waited there for Hashim to return and had a chat with the three persons. After about one and half hours Hashim returned and was seen carrying a bag. The appellant and Hashim then walked back to the house of the appellant's parents. On the way Hashim wanted to urinate and asked the appellant to hold the bag for him momentarily. It was soon after this that police appeared on their motor

cycles. He saw Hashim running away and he himself felt frightened and threw the bag away, but denied attempting to run away. After his arrest the appellant took the police to his parents' house where the police made a search and recovered clothing belonging to Hashim.

The shopkeeper, Mustaffa bin Yusof (DW3), confirmed that the appellant did come and buy some cigarettes from his shop that night. ASP Mohd Hanafiah bin Ismail (DW2) of the Anti-Narcotic Special Branch also testified of the abortive police attempts to trace the whereabouts of Hashim. There was however no dispute that at the time of the appellant's arrest, he was in the company of Hashim. *In short Hashim was not a fictitious person.*

The last defence witness was Norazam bin Mohamed (DW9). He testified that he was arrested the same night for possession of cannabis which he had purchased from Hashim. Fifty rolls of cannabis were sold to him on 11 July 1986 at about 5pm. The notes of evidence showed that in the course of cross-examination, the deputy public prosecutor had referred him to his previous statement to the police, but nothing further was done to impeach his credit, *with the result that his evidence remained admissible for consideration by the court on the issue of who was actually trafficking in cannabis on the night of 12 July 1986.* The fact that Hashim was trafficking in drugs when he sold cannabis to Norazam was not seriously challenged; nor was the fact of Norazam's arrest for possession of cannabis. There was therefore nothing inherently improbable that several hours later, Hashim continued to be trafficking in cannabis in that kampung when found in the company of the appellant. (Emphasis added.)

What comes through crystal clear from the lucidity of the language used, and particularly from those parts of the judgment upon which we have placed emphasis, is that there was sufficient evidence led to establish the fact that Hashim was the trafficker. The trial judge had, in respect of this evidence, said:

> The court has taken time to consider very carefully all the evidence in its entirety. The onus on the defence is to rebut the statutory presumptions on the balance of probability, especially the presumption under s 37(d), the presumption of possession and knowledge of the nature of the drug. Defence need not rebut the trafficking presumption of s 37(da) if defence has succeeded in rebutting the presumption of s 37(d). The defence can also raise a reasonable doubt where possible in the prosecution's case to be entitled to an acquittal.
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> ...
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> Was accused telling the truth? Were the three people (DW6, DW7 and DW8) sitting under the ketapang tree telling the truth? It is purely a question for the court to evaluate the evidence and make a finding on who are telling the truth and who are not telling the truth.

The Supreme Court reacted to the aforesaid direction by the trial judge in the following words [at p 171]:

> In this connection, counsel for the appellant had referred us to the case of *PP v Saimin & Ors* [1971] 2 MLJ 16 where Sharma J held that the falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt. We are of the view that whenever a criminal

A case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v PP* [1963] MLJ 263 go one step further before convicting the accused by giving due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. Thus, even though a judge does not accept or believe the B accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case. To satisfy this test it is not so much the words used by the judge, but rather the actual application of the test to the facts of the case that matters. In this case, we found that the learned trial judge offered practically no reason why the defence, notwithstanding its C falsity and unconvincing nature, had failed to cast reasonable doubt on the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal.

It is a well-established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which D he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt on the prosecution case. In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof E as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt. To earn an acquittal at the close of the case for the prosecution under ss 173(f) or 180 of the Criminal Procedure Code, the F court must be satisfied that no case against the accused has been made out which if unrebutted would warrant his conviction (*Munusamy v PP* [1987] 1 MLJ 492). If defence is called, the duty of the accused is only to cast a reasonable doubt on the prosecution case. He is not required to prove his innocence beyond reasonable doubt.

To earn an acquittal, the court may not be convinced of the truth of the G defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice. It is not, however, wrong for the court to be convinced that the defence version is true, in which case the court must order an acquittal. In appropriate cases it is also not wrong for the court to conclude that the defence story is false or not convincing, but in that instance, the court must not convict until it asks a further question that even if the court H does not accept or believe the defence explanation, does it nevertheless raise a reasonable doubt as to his guilt? It is for this reason that in dealing with the defence story or explanation, the majority of judges rightly prefer to adopt straightaway the legally established 'reasonable doubt' test, rather than to delve in the 'believable and convincing' test before applying the 'reasonable doubt' test.

I Dealing with the submission identical to that made before us, the Supreme Court laid down a principle of utmost importance, too often overlooked by courts which try cases of this sort:

The other crucial issue which had arisen in this appeal was the manner in which the learned judge had approached the law on the right of the appellant to rebut the two applicable statutory presumptions under the Act. In the penultimate paragraph of his grounds of judgment the learned judge said at pp 115 to 116:

> 'It is a finding of fact that the defence has not rebutted the statutory presumption of s 37(d) on the balance of probability at all *and it follows that the presumption of s 37(da) is also not rebutted.* Nor has the defence raised any reasonable doubt in the prosecution case. And it is a finding of fact that the prosecution case against the accused has been proved beyond any reasonable doubt. (Emphasis supplied.)

Whilst we could not disagree with what the learned judge had said earlier in his judgment that if the defence had succeeded in rebutting the presumption of possession under s 37(d), there was no need to rebut the presumption of trafficking under s 37(da), it did not follow that the presumption of trafficking would become irrebuttable merely because the defence had failed to rebut the presumption of possession. *In our opinion unless the evidence in a particular case does not obviously so warrant, it is incumbent for the court to consider whether on the balance of probabilities, the evidence of the defence has rebutted the statutory presumption of trafficking under s 37(da) as a separate exercise even though the court is satisfied on balance that the presumption of possession under s 37(d) has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.* (Emphasis added.)

On the issue of trafficking, we found the learned judge had failed to sufficiently consider the evidence of the defence witnesses, particularly that of DW9 which clearly indicated that on the night in question Hashim was in all probability the trafficker of the cannabis. In our view, the learned judge had acted on the wrong premise that once the appellant had failed to rebut the presumption under s 37(d), the presumption under s 37(da) became irrebuttable so as to relieve the court from the duty to consider separately on balance whether the presumption under s 37(da) had been rebutted. In our view, on the facts of this particular case, this error of law had occasioned a miscarriage of justice.

One who reads the judgment in *Radhi* will find that we have virtually reproduced the whole of it here. We have done so because the principle to be gathered from the words of Mohd Azmi SCJ, has been stated in such simple and exact terms that any attempt at paraphrasing it may, we fear, denude it of its valuable content and suffer loss by transposition into less adequate language.

The learned judge in the present case addressed the rebuttal of the presumption in the following rather cursory terms:

> Having considered the evidences (sic) in totality together with the demeanour of T (accused) in court, and after hearing the arguments of the learned defence counsel and DPP, I am satisfied that the case against T had been proved beyond reasonable doubt and that the defence had failed to rebut the statutory presumptions on the balance of probability as propounded in *PP v Yuvaraj* [1969] MLJ 59. Further, I find that defence had failed to raise any reasonable doubt as to the guilt of T.

A We agree with Encik Karpal Singh that the judgment when read as whole reveals no separate exercise as that postulated by the decision in *Radhi*. We also agree with his submission that the use of the plural expression 'presumptions' by the learned judge in the passage we have reproduced a moment ago does not amount to a sufficient compliance of what we will call 'the Radhi direction'.

B

The learned judge, having found the appellant's story about the existence of James Smith to be true, ought to have addressed his judicial mind to the further question as to whether there was any reasonable doubt raised that Smith was the real trafficker. Had he done so he may well have held that he was not, in which event our task would have been made that C much easier. Unfortunately he did not and it is our view that the failure by the learned judge to administer unto himself the Radhi direction renders his ultimate conclusion fatally flawed.

In our judgment, the failure of a judge to properly direct himself or in misdirecting himself is to be treated on the same footing as a non-D direction or a misdirection by a judge to a jury. *Rameshwar v State of Rajasthan* AIR 1952 SC 54; *Tan Yook Suan v R* [1954] MLJ 116 and *Gooi Loo Seng v PP* [1993] 2 MLJ 137 are decisions that are authority for this proposition. And in the last mentioned case Edgar Joseph Jr SCJ (now FCJ) stated the principle in the following words:

E

> Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction amounts to a misdirection, for in the words of Pickford J in *R v Bundy* 5 Cr App R 270: ' ... the trial was not satisfactory, and the case was not put to the jury in a way to ensure their F due appreciation of the value of the evidence'.
>
> We must treat the failure of a trial judge sitting alone, to direct himself correctly in the same way as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

Before us, the learned deputy fairly, and quite properly, conceded that the G learned judge was duty bound, in the light of his earlier finding, to administer unto himself the Radhi direction. In these circumstances, we had no alternative but to intervene and make the orders we have set out in the opening paragraph of this judgment.

There was a further submission made by Encik Karpal Singh relating H to the learned judge's adverse comment upon the appellant's flight from the customs office. The complaint here is that the learned judge had, when acquitting the appellant at the end of the prosecution's case, attached no weight to this fact, but when considering the defence had attached significance to it. By reason of the conclusions arrived at in respect of counsel's primary argument, it is unnecessary for us to make any comment I on this submission, particularly when we invited the learned deputy to refrain from making any response to it.

On the question of sentence, we took into account everything advanced by Encik Karpal Singh in mitigation, the learned deputy leaving the matter in our hands. Considering all the circumstances of the case and the quantity of the drug involved, we imposed the punishment adverted to earlier in this judgment.

Before we conclude, we think that it is necessary to say something about the conduct of the customs officers involved in the detection of the crime and in the apprehension of the appellant. Too often is there a tendency to overlook the extremely valuable contribution made by the officers of the several law enforcement agencies in the detection of crime and in the bringing of criminals to justice. We therefore take this opportunity to commend each of the customs officers involved in this case for their efforts in this case. But for their timely action, a substantial amount of a dangerous drug would have found its way into the hands of those who peddle death.

Appeal allowed.

Reported by Kevin Ooi